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TOTH V. QUARLES — FOR BETTER OR FOR WORSE?

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THE BACKGROUND

On Monday, March 7th, 1949, a subcommittee of the House Armed Services Committee opened public hearings on the proposed Uniform Code of Military Justice. Present, among others, was Professor Edmund M. Morgan, Chairman of the Committee appointed by the Secretary of Defense to draft a Uniform Code of Justice for the Armed Forces.

During a portion of Professor Morgan's testimony before the committee, the following discussion took place:

> *Mr. Elston:* . . . I think it was since you completed your hearings that a case has been decided by the Supreme Court of the United States.
>
> *Dr. Morgan:* The Hirschberg case?[1]
>
> *Mr. Elston:* Yes. To the effect that a person who has left the service, that is, who has been separated from the service, cannot be tried subsequently by a military court for an offense committed prior to such separation.
>
> *Dr. Morgan:* That is right.
>
> *Mr. Elston:* Now, you have not anything in your bill covering that? . . . . He may have even committed a murder within three days of his separation from service.
>
> *Dr. Morgan:* That is right. We have not covered that.
>
> *Mr. Elston:* He re-enlists and cannot be tried for it.
>
> *Dr. Morgan:* That is right.
>
> *Mr. Elston:* I think this committee can write something into the law that will take care of that ridiculous situation.[2]

In accordance with this expressed intent the committee recommended, that the Congress include in the Uniform Code of Military Justice, a provision which stated:

> [A]ny person charged with having committed, while in a status in which he was subject to this Chapter an offense against this Chapter, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.[3]

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1. United States *ex rel.* Hirshberg v. Cooke, 336 U.S. 210 (1949). Hirschberg was charged with a crime that was committed during his prior enlistment. The court held that the expiration of his term of enlistment and reenlistment before trial had deprived the military or jurisdiction to punish the crime.

2. *Hearings Before the Subcommittee on the Uniform Code of Military Justice of the House Committee on Armed Services,* H.R. 2498, 81st Cong., 1st. Sess., No. 37, at 565, 617 (1949).

3. Uniform Code of Military Justice, article 3(a), 64 STAT. 109 (1950) 50 U.S.C.A. § 553(a) (1951).

THE DECISION

In November 1955 the constitutionality of this provision was squarely presented to the Supreme Court of the United States in the much publicized case of *Toth v. Quarles*.[4] Toth, a former enlisted member of the United States Air Force, was charged with murder. It was alleged that he and a fellow airman apprehended a Korean national while on guard duty at an air base in Korea. They took the Korean before an Air Force officer who told them to take the captive to a secluded spot and kill him. They promptly obeyed the order. Subsequently, Toth returned to the United States and was given an honorable discharge. The alleged crime was later detected and Toth, now a civilian employee of a steel mill, was returned to Korea for trial by court-martial. His sister presented a petition of habeas corpus to the federal district court in Washington, D.C., where Toth had been taken by direction of the Secretary of the Air Force prior to his removal to Korea. The court ordered his release,[5] the court of appeals reversed,[6] and the Supreme Court granted certiorari.

The Supreme Court of the United States, with Mr. Justice Black speaking for the majority, held that the constitutional provision authorizing Congress to make rules and regulations for the government of the land and naval forces (the constitutional basis for the Uniform Code) could not be construed to allow such action on the part of the Armed Forces. Such a construction would conflict with article III and portions of the bill of rights. A perusal of history to ascertain the intent of the constitutional framers indicated that the personal rights and safeguards found in the bill of rights and article III must prevail.

The Court pointed out that a civilian is assured certain definite rights under the Constitution which are not guaranteed by the Uniform Code of Military Justice, the primary one being right to trial by jury. Hence, to allow a civilian to be tried by court-martial would be depriving him of these constitutional guarantees.

A careful, realistic comparison of rights guaranteed by both documents might render the constitutional reasons offered by the Court less compelling.[7] Further, such a comparison might reveal that a military defendant is surrounded by more safeguards and has more

4. United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955). During the litigation of the case, Mr. Talbott was replaced by Mr. Quarles as Secretary of the Air Force. However, the case is still commonly known as *Toth v. Talbott.*

5. Toth v. Talbott, 114 F. Supp. 468 (D.D.C. 1953).

6. Talbott v. United States *ex rel.* Toth, 215 F.2d 22 (D.C. Cir. 1954).

7. See Wurfel, *Military Due Process: What is It?*, 6 VAND. L. REV. 251 (1953). See United States v. Clay, 1 C.M.R. 74 (1951), in which the Court of Military Appeals compared the rights available to both the military and civilian accused.

assurance of a fair trial than his civilian brother.[8] However, such an analysis would not contribute to the solution of the problem that the decision clearly creates.

THE PROBLEM

What is the practical effect of the Supreme Court ruling? The application of the decision is of little significance for the punishment of crimes committed by subsequently discharged military personnel in the continental United States. Such offenders could be punished either in state or federal courts, provided the crime is not one of a purely military nature, such as absence without leave or misconduct as a sentinel.[9]

For all areas within the "special maritime and territorial" jurisdiction of the United States[10] (and the most liberal definition of these terms would not include all the sectors of the world containing American military personnel), the decision is of little significance, provided again, that the crimes are not ones of a purely military nature.

Further, the decision will be of little significance in foreign countries containing American troops where the United States, by treaty or agreement, has placed military personnel under the foreign government for the exercise of concurrent criminal jurisdiction.[11] Frequently publicized examples of such nations are member countries of the North Atlantic Treaty Organization and Japan. This is provided, once again, the crimes committed in these countries are not of a purely military nature.

There are areas in which the decision will have application. First of all, the full impact and significance of the ruling will be most keenly felt in that unfortunate country giving rise to the *Toth* case—the Republic of Korea.

By the Taejon agreement of 1950,[12] the Korean government conceded exclusive criminal jurisdiction over members of the United States military establishment to the military authorities, and as of this

8. For example: the military accused is furnished legally trained counsel at all stages of the prosecution in offense of a serious nature; is entitled to a verbatim copy of the record of trial; generally knows all of the evidence to be presented against him prior to the trial; and has mandatory review of his conviction by an impartial body far removed from the scene of the offense and trial. Further, the decisions abound with instances where convictions have been reversed for the slightest indication of improper influence.

9. Crimes of this nature are not found in the civilian penal codes.

10. Most crimmal offenses listed in Title 18, United States Code, are limited to the United States, and its "special maritime and territorial jurisdiction."

11. North Atlantic Treaty, June 19, 1951, T.I.A.S. No. 2846; Administrative Agreement With Japan, Feb. 28, 1952, 3 U.S. TREATIES & OTHER INT'L AGREEMENTS 3341, T.I.A.S. No. 2492.

12. Agreement between the American Ambassador to the Republic of Korea and the Minister of Foreign Affairs, Republic of Korea, executed at Taejon, Korea, July 12, 1950.

writing, the United States and Korea have not entered into an agreement similar to that with the NATO countries. In addition, the criminal jurisdiction of the courts of the United States is limited to the United States and its "special maritime and territorial" jurisdiction. Therefore, the decision creates an anomalous situation—not original but infrequent. It presents the deplorable condition of detected, provable, legally recognizable crime committed by United States citizens that cannot be punished. The crime alleged in the *Toth* case is an inglorious example of this conclusion. In view of the jurisdictional limitations imposed on federal courts and in deference to the Taejon agreement, the United States military establishment was the only governmental authority with jurisdiction to bring airmen-civilian Toth to trial. The Supreme Court decision has denied the military this jurisdictional power, and the crime will remain unpunished.

The full significance of the decision in Korea, with its thousands of American military personnel, is best illustrated by the fact that military police investigators and judge advocates preparing for trial often discover brazen, profitable crimes committed by military personnel who have returned to the United States and have been subsequently discharged. It is common conversation among military law enforcers that former privates in Korea are now quite wealthy civilians in the United States. Unless remedial action is immediately forthcoming, the condition created by the absence of a valid statute granting jurisdiction will seriously hamper proper law enforcement in this area.

It hardly needs adding that the Supreme Court decision creates a "vacuum" of this nature in any foreign country containing United States military personnel with which the United States has not executed a status-of-forces agreement.

Secondly, the full impact of the decision will be felt on that portion of the military criminal law that defines and punishes certain offenses that are historically and inherently military in nature, such as, absence without leave, disobedience of orders, misconduct as a sentinel and the other offenses defined in articles 84-115, 133 and 134 of the Uniform Code of Military Justice. The most cursory glance at these offenses indicates their overwhelming importance to the maintenance of proper discipline in the armed forces. The federal code, criminal laws of the various states and criminal codes of the foreign nations with whom the United States has status-of-forces agreements, do not punish such offenses in civil courts in view of their peculiarity to the military. Consequently, military personnel, who commit undiscovered crimes of this nature, either within or without the continental United States, and who are discharged before apprehension, are free from any threat of punishment. Mr. Justice Black to the contrary, the potential impact of this situation upon discipline, the foundation of any effective military force, is readily apparent.

THE SOLUTION?

There are three possible methods which could be considered in attempting to eliminate the "vacuum" created by the decision. However, each possibility has definite disadvantages.

First, and worthy of the closest scrutiny, is the suggestion by the Supreme Court in the *Toth* opinion that Congress, by appropriate legislation, could make such offenses and offenders triable in federal courts.

It is generally agreed among writers and commentators that the right to exercise jurisdiction over subjects who have committed offenses in a foreign country is an essential attribute of sovereignty, and Mr. Wheaton, a purported authority on international law, has gone so far as to say that this principle is peculiar to the jurisprudence of England and the United States.[13] However, a perusal of Supreme Court decisions on the point indicates only two cases pertinent to this view, but not expressly in point. In *American Banana Company* v. *United Fruit Company*,[14] the plaintiff sued the defendant for threefold damages resulting from a monoply allegedly created in South America. Mr. Justice Holmes, in holding that the Sherman Act did not apply, said,

> No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent, the old notion of personal sovereignty alive . . . And the notion that English statutes bind British subjects everywhere has found expression in modern times and has had some startling applications. . . . But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.[15]

However, in characteristic manner, Mr. Justice Holmes continued by adding the dictum that acts of Congress will be regarded as territorial *unless* the contrary appears. Although this expression is an indication that the Supreme Court feels certain statutes of Congress may be given extra-territorial application, and some text writers have so regarded it,[16] it cannot be construed as a holding that Congress may confer criminal jurisdiction by a statute that would have application to crimes committed in a foreign country.

In *Blackmer v. United States*,[17] the defendant, a resident of Paris,

13. WHEATON, ELEMENTS OF INTERNATIONAL LAW § 113 (Wilson ed. 1936); see also 1 WHARTON, CRIMINAL LAW § 316 (12th ed. 1932); BRIGGS, THE LAW OF NATIONS 275 (1947).

14. 213 U.S. 347 (1909).

15. *Id.* at 356; cf. United States v. Bowman, 260 U.S. 94, 98 (1922).

16. BRIGGS, THE LAW OF NATIONS 275 (1947).

17. 284 U.S. 421 (1932).

France, was convicted of contempt of court for failure to answer a subpoena served in Paris, issued by the Supreme Court of the District of Columbia. The United States Supreme Court, with Chief Justice Hughes speaking for the majority, held that the District of Columbia court had jurisdiction over the defendant by virtue of his American citizenship. This case is readily distinguishable from the problem under discussion as the situs of the crime was in the District of Columbia, the place where the dignity and power of the court was offended, and extradition made jurisdiction over the person easily obtainable.

To buttress the argument that Congress could pass such a statute, attention may be directed to the criminal statutes now in existence that seemingly have extraterritorial application. Treason, piracy, and certain correspondence with foreign governments in an attempt to influence foreign policy are made punishable by statute regardless of where the acts are committed.[18] However, in each of these instances it is not difficult to lay the situs of the crime within the United States or on a vessel of the United States. It might also be added that, under international law, any nation has power to punish a pirate apprehended within its territory.[19]

In opposition to such a proposed enactment of Congress is the well-settled and universally adopted principle of criminal law that in order for a sovereign to punish a crime there must not only be jurisdiction over the person of the offender but also over the situs of the crime.[20] A statute by Congress permitting federal courts to try an offense committed in Korea, for example, would hardly meet the requirements of the latter portion of this rule. Also, it appears that such a statute would directly conflict with the sixth amendment to the Constitution of the United States which provides that "The accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed."

Further, it may be assumed by implication, that the United States Attorney General and his federal prosecutors adhere to the view that the criminal laws of the United States cannot apply to crimes committed on foreign soil, or that federal courts do not have jurisdiction over such offenses. In the widely publicized case of *LaBoles* and *Icardi*, accused of murdering Major Hollohan in Italy during World War II, the defendants were never brought to trial, and the prosecution was apparently dismissed. Due to the absence of an extradition treaty with Italy, the alleged offenders could not be returned abroad for trial, nor, apparently, could they be tried in the courts of the United States for a crime committed on Italian soil.

18. 18 U.S.C.A. § 2381 (1951).
19. American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).
20. 14 AM. JUR., *Criminal Law* § 214 (1936).

A statute of the nature suggested by the Supreme Court would be most impractical for the government and most burdensome for those charged with the prosecution of foreign crimes.

As an example, assume the existence of such a statute at the time airman-civilian Toth was apprehended. Under such a statute Toth would be tried in the Western District of Pennsylvania. This, according to Mr. Justice Black, will insure that Toth has an opportunity for the presentation of witnesses equal to that of the prosecution. But is that true? The military, with its unlimited financial resources could, and would, order military personnel to fly from Korea to testify, and arrange for the appearance of indigenous Korean or American civilian witnesses. The defendant Toth, on the other hand, would be in a most difficult position unless he has wealth of an unusual proportion. The cost of one single witness from Seoul, Korea would approximate $1,500 in travel fees alone,[21] and provided the Attorney General has certified that the witness is essential, this amount must be presented by the American Consul in Seoul at the time the subpoena is served.[22] Testimony cannot be obtained by deposition in the federal criminal courts, and in addition the subpoena power of federal district courts through the consular service abroad extends only to American witnesses.

The second possible solution is to place a provision in the enlistment contracts of that large body of military personnel who voluntarily enlist in the respective services by which they agree to remain subject to the Uniform Code of Military Justice until five years after the termination of their enlistment.

This suggestion has definite legal objections. As mentioned previously, it is a generally accepted principle that although an offender may consent to jurisdiction over his person, his consent cannot confer jurisdiction over the situs of the crime.[23] In addition it is doubtful if such a provision could be extended to the large number of military personnel whose service is compelled by the Selective Service Act.

The third possible remedy available is for the United States to execute a status-of-forces treaty with the foreign countries that now contain United States military personnel, such as the Republic of Korea, giving them complete authority to punish crimes committed within their sovereign boundaries. This method would be technically correct from a legal standpoint, and well founded in precedent. However, in countries such as Korea, criminal procedure and personal rights of the accused are not always consistent with those granted by the Constitution of the United States, nor, frequently, is representation

21. 28 U.S.C.A. § 1821 (Cum. Supp. 1955).
22. *Ibid.*
23. 14 AM. JUR., *Criminal Law* § 214 (1936).

by counsel adequate by American standards.[24] In addition, daily newspaper accounts indicate the growing apprehension of lawmakers to agreements that subject American citizens to trial in foreign countries, with foreign languages and foreign procedures.[25]

Perhaps this objection could be eliminated by the establishment of consular courts similar to those already provided by the federal code.[26] Under this plan, the American consul present, by treaty agreement, enforces the criminal laws of the foreign country in accordance with the procedures established by the statute bringing it into existence. The obvious defect in this plan is that it in no manner guarantees those personal constitutional rights that the Court so jealously guarded in the *Toth* case. For example, trial by jury in a consular court in a foreign country would be meaningless, if not impossible.

CONCLUSION

In summary, it would appear that the Supreme Court, through the *Toth* decision, has created a situation that bears a potentiality of injustice and social detriment completely out of proportion to that feared from the provisions in the Uniform Code of Military Justice unhesitatingly declared unconstitutional. If the Court had adopted a practical and realistic approach to the problem, comparing the rights of the individual under both the constitution and military law, and visualizing the problem created by its present decision, the result could have been different. Now, Congress must attempt remedial action and determine the method of cure that will result in the minimum deprivation of personal rights—which is exactly what it did in 1950 when it enacted article 3 of the Uniform Code of Military Justice.

24. Storey, *Korean Law and Lawyers: The New Korean Legal Center*, 41 A.B.A.J. 629 (1955).
25. Newsweek, Feb. 20, 1956, p. 33.
26. See 20 STAT. 131 (1878), 22 U.S.C.A. §§ 141-83 (1952).